SLAVE PROPERTY

IN THE

TERRITORIES.

[FROM THE LAW REPORTER FOR OCTOBER, 1860.]

BOSTON:
PRESS OF GEO. C. RAND & AVERY,
No. 3 CORNHILL.
1860.

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SLAVE PROPERTY IN THE TERRITORIES.[1]

It is neither within our wish nor the purposes of this journal, to engage in the discussion of any matters which are agitating the political mind. But, on the other hand, we see no reason why we should be deterred from examining any question of purely constitutional law, by legal and constitutional tests, because partisan bodies, in a struggle for political ascendency, see fit to assume its decision to be in one direction or another.

It is a singular fact, that one of the most exciting topics which is engaging public attention in the present presidential canvass, grows out of a construction of the Federal Constitution. Each party affects to go to that as its guide, and to build upon that its theory of political action. And that the whole country should be agitated to an extent that even threatens the dissolution of the government, upon the point whether the fundamental law says and means one thing or another, when the framers of that law devised and planned it, with so much care and solicitude, to be a plain, intelligible test and standard, by which all other laws were to be examined and tried, is certainly most remarkable, if it is not most alarming. If, indeed, our constitution is so vague in its terms, or so inconsistent in its parts, that men of sound judgment, adequate knowledge in matters of history, and honest purposes, are unable to understand the meaning and effect which the framers of the instrument and

[1] We admit this article, contributed by a distinguished jurist who is not a politician, as a fair discussion of a point of constitutional law, but without adopting all the opinions of the author or assenting to all his conclusions.—ED. L. R.

THE BUFFALO HISTORY MUSEUM

the people who voted to adopt it, intended it should bear, it is but a sad commentary upon the political sagacity of the wisest and most patriotic of men.

The subject to which we allude is, what are the constitutional rights of the holders of slaves who reside in the States, in respect to such slaves within the territories of the United States? As we understand the questions which have been raised, the view entertained by one class is that slaves are property, that the territories are a common heritage of all the States alike, and that the owners of any of this class of property have the same right to carry and hold their slaves, as they would their horses or neat cattle, in any of these territories, and that it is not competent for Congress to pass any law prohibiting them from so doing. Another view maintained is, that, while Congress may not pass a law prohibiting the possession of slave property in the territories, the people themselves who migrate thither, may, as soon as they are competent to act as a body politic at all, determine whether slaves shall be held in the territory which they occupy; that it is a question which the settlers alone are competent to determine, and that they may do so, without waiting to become organized into a State.

The other view is understood to be this, that Congress has, by the very necessity of the case, as well as by the language of the Constitution, full powers to make all necessary laws for the regulation of the territories, until they become States, and that among these powers is that of determining whether slaves shall be held there or not,—connecting with this dogma, the duty, as well as the right of Congress to prohibit slavery in the territories.

We have quoted from the language of no platform in making this statement, and have borrowed what we understood to be, in general terms, the several positions assumed by these parties, without entering into details.

Each of these theories, we understand, has able and earnest supporters, who base their arguments upon what is alleged, or assumed, to be the meaning of the Constitution.

Now, without troubling ourselves with either of these as political dogmas, we have been led to look at the Constitution itself, in what seemed to be a legal point of view, to ascertain, if we can, what the relation of slaveholders in the States is to the territories, in respect to their slaves, as a pure matter of constitutional law.

THE BUFFALO HISTORY MUSEUM

In the first place, the Constitution was not a thing granted or imposed by a superior to or upon an inferior. Every one of the original thirteen colonies, then States, that had tried the experiment of the confederation, "in order," as they say, "to form a more perfect union," took part, through their delegates, in framing that instrument, (*vide per Wayne, J.*, 16 Peters, 638.) Every part, clause, and provision of it were, afterwards, elaborately discussed in public essays and debates, before the people of the several States acted upon its adoption.

Whatever were its provisions, they must have been examined in the light of the past and present condition of the late colonies, at that time States, and could not have been hastily adopted or approved. The States, as was the case with Massachusetts, if they had objections to the instrument in any of its parts, suggested the desired remedies and corrections by the amendments they proposed.

The limits of territory, constituting these several States, were either then known and defined, or were soon after satisfactorily determined, so that there could be no misapprehension as to the extent over which each State might exercise its own sovereignty and jurisdiction. Within that specific territory, Congress, though representing the sovereign power of the whole, had no jurisdiction or authority whatever, beyond certain limits, and defined subjects, which were necessary to give a simple, effective, and homogeneous action to the General Government, over the federal body politic. (*Vide per McLean, J.*, 16 Pet. 663.) Among these the subject of slavery was not embraced, as one over which the General Government, by any power expressly delegated, had cognizance.

On the other hand, beyond the line of its own jurisdiction, no State had a right to exert or extend its sovereignty.

In some of these States, domestic slavery then existed. In others it had been abolished, though it had once existed in all. It was obvious that, with this limited power on the part of Congress, if each State was to be, in all things, sovereign and independent, the consequence would be, that, if any one escaped from his own State into another, there would be no mode of reaching him so as to reclaim him, except as an act of comity. This was the uniform condition of things between independent nations where provision had

THE BUFFALO HISTORY MUSEUM

not been made by treaty for the extradition of persons in certain prescribed cases.

A difficulty and an emergency like this had existed between the New England colonies, at their first planting, which had been obviated by a clause in the articles of confederation into which they had entered in 1643. By those, in addition to a provision for the surrender of fugitives from justice, "it is also agreed that, if any servant run away from his master, into any of the confederate jurisdictions, that in such case (upon certificate, &c.) the said servant shall be either delivered to his master, or any other that pursues, and bring such certificate and proof." While the articles of confederation of the States, of 1778, contained a clause for the extradition of fugitives from justice, there was no provision made for delivering up those who were bound to service and had escaped from one State into another. It was further provided by that confederation that "the *free inhabitants* of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of *free citizens* in the several States."

It is hardly necessary to repeat in this connection, that slavery is, from the nature of things, a local institution, the creature of local legislation, or of the exercise of the supreme power in a State, and that a law or edict of this kind can have no binding obligation, as such, beyond the limits of that particular State. The consequence is, that if a person who is, by such law or edict, declared a slave in one State, goes into another independent State, he ceases to be such, and cannot again be made a slave there, except by the act of the sovereign power of the State in which he is found. (16 Peters, 611, *Prigg's case.*)

Accordingly, if a citizen of Maryland owning slaves had removed into Pennsylvania to reside, carrying his slaves with him, it is too obvious for argument that they would have, at once, been free. All idea of *property* in them would have been lost. By the same principle, it would have made no difference with the personal *status* of the slave, outside of the limits of the State by whose laws he had been held to service, whether he was carried into a territory which had, or one which had not, an organized government, or whether it had been constituted into a free State. He would have lost his original *status* of a slave, and

THE BUFFALO HISTORY MUSEUM

acquired that in which the law of his new residence had placed him, or, if it was without a municipal law, he would be free by the law of nature.

These principles, by the way, are a great deal older than our Constitution, and were familiar to the men who framed it.

They saw, too, the consequences to which it must lead. In fact, the experience of the country under the confederation, in respect to slaves, must have suggested the consequences. And they undertook to obviate it, not only in respect to fugitives from justice, but as to all "persons held to service," whether indented apprentices or slaves, provided they were held in any of the States "under the laws thereof," escaping into another State. For cases like these, they provided a plain, intelligible, but stringent rule, by extending, as it were, the sovereignty of one State over the other so far that whomever the one declared a slave, should, in certain contingencies, be regarded still a slave, though within the territory of the other. (*Vide per Wayne, J.*, 16 Peters, 645.)

But while the convention were thus endeavoring to adjust conflicting questions of property, and sovereignty between individuals and States, they aimed, also, as we are told in the 84th number of *The Federalist*, to make the Constitution a "Bill of Rights of the Union."

And, accordingly, while they extended the privileges of citizenship over the Union, and provided for the surrender of fugitives from justice, they were careful to *define* under what circumstances any other *person* might be delivered out of the protection of a sovereign State, upon the requisition of some person claiming such a surrender.

After providing in Art. 4, § 2, that *citizens* in each State shall have privileges and immunities as such, in the several States; and, in the next, defining under what circumstances a person should be surrendered as a fugitive from justice, —the article declares that "No *person* held to service or labor in one State, under the laws thereof, *escaping into another*, shall, in consequence of any law or regulation therein, be discharged from such service or labor, *but shall be delivered up*, on claim of the party to whom such service or labor may be due."

This is the entire provision, and we have italicized some of the words as bearing upon the question, upon what

THE BUFFALO HISTORY MUSEUM

authority it is contended that the Constitution recognizes slaves as *property*, except so far as to provide for their being delivered up to one claiming them.

In the first place, the Constitution nowhere declares that any man is a slave, or shall be such; nor does it provide for making any man, by any act of legislation, a free man or a slave. It nowhere recognizes property in man as a thing of barter, sale, or confiscation.

If it is said that everybody understands that this clause was aimed to affect the surrender of slaves to their masters, although the term "slave" is not made use of, it is equally true that when they came to provide for that, they chose to make it broad enough in terms, to embrace all cases of persons held to service, as well the indented apprentice as the slave bought in the market. In treating of them, moreover, they regarded them, so far as the action of the federal government or the Constitution was concerned, *persons* and *persons only*. Their absolute personalty ceased only *when* they had been delivered up to the one to whom their labor was due, and only *where* such labor could by law be enforced.

Was it ever contended that the Constitution recognizes any right by which, if the slave of a Virginian master were to escape into Pennsylvania or Ohio, and was there employed and worked by a citizen of the latter State, the master could maintain *trover* for his slave, or *assumpsit* for his services upon an implied promise to pay the master his wages? (*Vide per Thompson, J., Priggs case*, 16 Peters, 634.)

The remedy of the master, in such case, is a special and peculiar one, and is the seizing of the person whom he claims as a slave, not the recovering, by law, of his value, as a thing of property, nor even of his person, as property, by any form of process known to the common law, like *replevin*. Nor, if the place of seizure is a free State, had the master any right to work or sell his slave in that State, as having a property or ownership in him. The most he could do was to carry him into a State where he was a slave by force of the municipal law there. It is only when the slave shall have been taken out of the free State, into the State where, though wearing the image of a person, he is, by statute, a chattel, a thing of which property is pred-

THE BUFFALO HISTORY MUSEUM

icated, that the rights of property could be exercised over him.

But who are the *persons* who can be thus delivered up, as being within the exception to the general protection of State sovereignty, created by this clause of the Constitution? Not only must they have been held to service in a State, but they must have *escaped* from that State into *another*. And even then they are not outlaws, liable to be seized or set at work or carried away at the pleasure of any man. It is only "the party to whom such service" is "due," who can lawfully seize or cause them to be seized and delivered up. If he does not interfere, these fugitives, if in a free State, may live quietly, as *persons*, all the rest of their days, and nobody have a right to molest them. (*Vide per McLean, J.* 16 Peters, 668, 669.) They may not be citizens, but they, certainly, are not, for the time being, while thus residing in a free State, chattels or things, of which property may be predicated.

If this view is correct—and we submit, it is the fair, legitimate reading of the letter of the Constitution—how does this question of the existence of slavery in the territories arise? Where is there a word which gives to Congress the power or the right to institute slavery in any one of these territories? The question is not whether they can or shall make laws, applicable to the territories, to facilitate the surrender of *fugitive* slaves to masters in the States, but whether they can convert, for the first time, a territory, by an act of legislation, into a body politic, and govern it by a slave code, and authorize the holders of slaves from other States to bring and hold them there, by a law thus made by Congress, for that particular territory? If this cannot be done, can Congress authorize South Carolina or Mississippi, or any Slave state, to extend the State sovereignty of these States, with their several local laws and institutions, over the new territories belonging to the federal republic in its sovereign capacity?

We confess we are at a loss to see where Congress gets the power from the Constitution, to act at all upon the subject of slavery in the territories. We make no inferences from the supposed fact that all the then territory of the United States had been provided for, by existing laws and ordinances, and that therefore the convention probably did not foresee or intend to provide for the acquisition of new

THE BUFFALO HISTORY MUSEUM

territories or for the existence of slavery therein. In construing an instrument like the Constitution, we ought indeed to have a proper regard to the circumstances surrounding its adoption, if its terms are equivocal, or apparently inconsistent. But where its language is plain, its provisions harmonious and capable of being carried into full effect, there is no room for construction. The instrument, itself, forbids extending it beyond what is necessary to carry its several provisions into effect. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

But it may be said, that unless Congress may pass laws upon the subject of slavery, in the territories, slaves may be carried and held there, and be without relief or remedy. If we concede to the utmost that Congress may "make all *needful* rules and regulations respecting the *territory* belonging to the United States," they need not legislate either for slaves or against them, as such. It is enough to legislate for *men*, for *persons* living and dwelling in such territory, if, in fact, they are voluntarily brought there by their former masters. If bringing them there makes them free, they are entitled to the same rights that a free black man from Massachusetts or New Hampshire would have, as a resident within the territory; and a law that would answer for the one, would answer equally well for the other.

On the other hand, it may be said that this doctrine excludes every slaveholder from the territories, because if he cannot carry his slaves there and hold them, the territory will eventually grow into a free State. If such is the legitimate effect of carrying out the Constitution, according to its fair meaning and effect, it may furnish an argument, in the minds of some persons, in favor of changing the Constitution. But it can be of no weight in determining what the Constitution, in its terms, is.

Nor do we see any relief in any legislation by an organized territory, upon the subject. The people of a territory derive their legislative power and governmental functions from Congress, representing a federal sovereignty for certain purposes, over the several territories. But the power of Congress over slavery must be the same within any given territory, whether it has ten or ten thousand in-

THE BUFFALO HISTORY MUSEUM

habitants. And when it delegates its powers to these inhabitants by a territorial organization, it can delegate no more than it has to part with. It could not, for instance, authorize a territorial government to establish a class of nobility, or install a king with a hereditary title within its boundaries.

We intend to confine this line of argument to what is written and settled, without indulging in speculations as to how the Constitution ought to have been framed, or what this or that member of the convention probably intended. They made a written constitution, open for all men to read and govern themselves by, and for legislatures and States to conform to. They intended it to be a fundamental law which should be changed only by the forms and mode prescribed in the instrument itself. It was the action of the people of independent States, (*vide per Wayne*, 16 *Pet.* 638,) and it contemplated the admission of still other States, which, when admitted, would be as sovereign as themselves within their limits, and as fully empowered to adopt or reject slavery, as the original members of the federal body had themselves been.

And here, as it seems to us, the Constitution leaves the matter. It is when it shall have become a State, and then only, that any part of the territory of the United States can be made to hold a slave, unless he is one who has escaped from a State where he was held to service, and is there arrested and delivered up as such.

Of the political bearings of this examination we take no account. The true meaning of the Constitution is not to be determined by its effect upon the prospects of any one party or another. We have had quite enough of politico-constitutional construction already, — far too much for the peace and stability of our government. As the Constitution was the basis upon which the government itself was built up, it was designed to be stable and permanent, and not to be bent and shaped every four years, to conform to the shifting issues upon which successive presidential elections were to depend.

Nor ought we to be affected in the judgment to which this examination leads, by the singularly reckless declaration of an officer high in authority, to the effect that Kansas was as much a slave territory as South Carolina. It is no more within the province of a president to declare a

THE BUFFALO HISTORY MUSEUM

person in a territory a slave, than it is for him to declare one, held in service in a slave State, free.

Nor can it aid in this discussion, to inquire whether the result of our examination operates to equalize the rights and powers of the several States as to the public territory, or not. The constitution, as made, was the fruit of compromises and concessions, and, as such, was satisfactory to the people who adopted it. Whatever territory has since been acquired, has been added to the national domain, with a full knowledge on the part of the high contracting parties that the Constitution was just as it now reads. And, in voting for or against the acquisition of this territory, it must have been a question of balancing interest which the representatives in Congress settled for their respective States. And if the meaning and effect of the Constitution was, that the question of having slavery in this territory must be suspended until it should have become a State, it is unfair and unjust, as well as unconstitutional, to insist upon anticipating and deciding the question while it is yet a territory. Individuals could have had no property in the sovereignty over those territories to be regarded in exercising it, and the States owned no slaves with which to occupy them.

Nor, as it seems to us, is the argument hereby intended to be maintained, affected by the historical fact that when the territory, afterwards Tennessee, was ceded to the United States, Congress was expressly prohibited to emancipate the slaves there; and that a similar provision was adopted in reference to Mississippi, when ceded to the general government. It will be remembered that the region constituting these territories had been claimed by the States of North Carolina and Georgia, at the time of the making of the Constitution; that it was then contemplated that it should be ceded to the United States; that this was recognized, in effect, in the second section of the fourth article of that instrument; and that when the territory was ceded by those States to the United States, it was done upon the express limitation that slavery should not be disturbed. To this, Congress assented, and became a trustee of the territory, by virtue of this constitutional arrangement, and not by any inherent power to acquire new territory and then to decide whether it should be free or slave in its character and institutions. Nor do we conceive that there is anything

THE BUFFALO HISTORY MUSEUM

affecting the argument, in the action of Congress in respect to the territories west of the Mississippi, and northwest of the Ohio, including Iowa and Oregon. In a part of these, it is true, slavery was permitted, and in others prohibited. But whatever may have been the form in which this was done, the effect was what, according to the view above maintained, the Constitution intended Congress should do. In some of these slavery had already been established, and slaves were then actually held under and by virtue of the laws of a sovereign State, creating and regulating slavery within the territory then to be organized. In respect to these, Congress, virtually, left the institution as it found it, by a declaratory act to that effect. In the others of these territories, slavery did not exist. In a part of them it had been excluded by the ordinance of 1787. And in respect to both these, Congress did as it did towards those having slaves: it declined to authorize slavery to be introduced there by what was, in effect, a declaratory act, though in terms a positive enactment.

The "rules and regulations," moreover, which Congress was authorized to make, "respecting the territory," &c. were obviously such as were suited to territories owned by, or under the guardianship of, a superior power, as distinguished from the action of an inherent sovereignty, which is something other than, and distinct from, our idea of ownership, in the nature of property.

This function of sovereignty remained to be exercised when these territories, having become sufficiently populous to sustain and manage their governmental concerns, had been admitted as sovereign States into the national family.

This very matter of adjusting the conflicting interests growing out of the existence of slavery in the Union, had been one of the chief difficulties which the convention had had to encounter. It was compromised, at last, by, among other things, each State giving up so much of its sovereignty as to suffer the citizens of other States to come within its territory, and seize persons residing there, if they had been held to service in and had escaped from another State. In the mean time, the federal sovereignty over this subject, within the States, was limited to carrying out this right of extradition. And yet, according to the theory that Congress had unlimited power of making any rules and regulations for the territories it might think fit, this

THE BUFFALO HISTORY MUSEUM

same convention and the people were willing that Congress should legislate into the territories the germs of future independent States which might, as they have done, in time outnumber the original thirteen, and perpetuate therein this very institution which had been a source of so much discord and jealousy among the very States which were thereby struggling and making mutual sacrifices to obviate the mischiefs it occasioned. Would they not, in all human probability, have chosen to leave it in the new States as they had left it in the old ones, to be regulated by them, each for itself, within its own limits?

And when this instrument, the result of their deliberations, is carefully examined in the light of the language they employed, and of the circumstances under which its parts were adjusted, does it not fully sustain this construction? With such an interpretation, at once plain, simple, intelligible, and suited to any extent of growth and expansion of the republic, it became, as it was intended to be, an instrument of peace, harmony, and perpetuity between the States, and of strength, efficiency, unlimited growth and united sovereignty to the nation, when taking its place among the sovereign nations of the earth.

THE BUFFALO HISTORY MUSEUM